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No.....

IN THE

Supreme Court of the United States

October Term, 1954

GRADY ALEXANDER,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

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Grady Alexander prays that a writ of certiorari issue to view the judgment of the Court of Criminal Appeals of Texas, finally entered on June 26, 1954, affirming his felony conviction for violation of Article 1391, Texas Penal Code,[1] and imposing a five year penitentiary term.

OPINIONS BELOW

Neither the original opinion of the Court of Criminal Appeals of Texas, dated April 7, 1954, nor the opinion on rehearing, dated June 2, 1954, is yet reported. Both such opinions are reprinted herewith in the Appendix.[2] Second Motion for Rehearing, timely filed in the Court of Criminal Appeals of Texas, was denied without opinion on June 26, 1954.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3). Petitioner's rights to due process of law and equal protection of the law guaranteed by the Fourteenth Amendment have been denied him. The Court of Criminal Appeals of Texas is the highest court of the State of Texas in which decision in this case could be had. As above indicated, that Court entered its final judgment in this case on June 26, 1954.[3]

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[1]Reprinted in full in Appendix A, p. 15, *infra.*

[2]Original Opinion of Court of Criminal Appeals of Texas, dated April 7, 1954, printed at pp. 16 to 22, *infra.* Opinion on Rehearing, dated June 22, 1954, printed at p. 23.

[3]See Appendix C, p. 24, *infra,* where final judgment is printed in full.

QUESTIONS PRESENTED

1.

Whether a white man, engaged in organizing and representing both Negroes and whites in an unsegregated labor union in a community where community resentment against a white man who would aid Negroes in breaking down segregation barriers is even greater than is the resentment against the Negro himself, is denied due process and/or equal protection as guaranteed by the Fourteenth Amendment to the Constitution of the United States, upon indictment by a grand jury selected on a basis of studied and systematic exclusion of Negroes.

2.

Whether a white man, engaged in the organization and representation of both Negro and white employees of the principal industry of an East Texas community into an unsegregated labor union of which over 75% were Negroes, has a right under the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States, to require that his indictment for alleged violence occurring during a strike of this unsegregated union be considered by a grand jury selected without regard to race?

CONSTITUTIONAL PROVISION INVOLVED

Method and Timeliness of Raising Constitutional Issues

The Constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States.[4]

The constitutional issue was raised in the District Court of Smith County, Texas (the Trial Court) by Motion to Quash the Indictment, filed prior to pleading to the merits of the indictment.[5] The trial court heard testimony on this motion for three days as to the discriminatory make-up of the Grand Jury and the consistent application of a scheme of exclusion of Negroes from Grand Jury service. Despite the clear and undisputed showing as to systematic exclusion of Negroes as Grand Jurors, the Trial Court denied the Motion to Quash without opinion. Presumably, the denial was on the same basis later enunciated by the Texas Court of Criminal Appeals: That a white man had no standing to raise this Federal question, i. e., that this constitutional protection of fair selection of Grand Jurors without regard to race, could be invoked only by a member of a minority race or class.

The question was presented to the Court of Criminal Appeals of Texas by assignment of error, reprinted in the Appendix herein,[6] and a brief was presented in support of this assignment of error.[6a]

Again on Motion for Rehearing at p. 16, these questions were again presented, viz.:

"The Court erred in holding (Opinion p. 8) that appel-

[4] Reprinted, as Appendix D, *infra*, p. 25.

[5] See Appendix E, *infra*, pp. 26 to 30, where Motion to Quash Indictment is reprinted in full.

[6] See Appendix F, p. 31, *infra*, for assignment of error to action of Trial Court in failing to quash the indictment for failure to select Grand Jurors without regard to race.

[6a] See Original Brief to Court of Criminal Appeals, pp. 42-49.

lant, not being a member of the negro race, could not attack the indictment as having been returned by a grand jury in the organization of which racial discrimination was practiced."

And at p. 17:

"The court erred in refusing to hold that appellant has been deprived of rights of due process and equal protection guaranteed by the United States Constitution in the selection of the Grand Jury which returned the indictment, on a basis of studied and systematic exclusion of negroes from the Grand Jury; or, alternatively, on the basis of proportional limitation of Grand Jurors on the basis of race."

The Texas Court recognized that these questions were before it and in its original opinion held:

"Appellant, a white man, attacks the indictment, alleging that race discrimination was practiced against members of the Negro race in the organization of the grand jury which returned the indictment in this case. His authority for such attack is based, he asserts, upon the proposition that the union, of which a large portion were Negroes, was here involved.

"Not being a member of that race, appellant could not urge (as beneficial to him) discrimination against members of the Negro race."

No further mention of the point was made in the subsequent opinion, though, as noted above, the point was repeatedly pressed by appellant.

STATEMENT OF THE CASE

Grady Alexander, a white representative of the Molder's Union, A. F. of L., organized and sought to bargain on behalf of the employees of Western Foundry in Tyler, Smith County, Texas. Over 75% of the union members were Negroes. Alexander organized this unsegregated labor union, and, on his advice, after bargaining efforts failed, the union voted to strike.

The strike of the principal industry in this East Texas county of 46,241 adult population was of extreme interest to the entire community. Radio and newspapers reported daily on the strike situation. Charges of strike violence were made by both management and union representatives.[7] Front page news stories daily reminded the community of the effective strike by this union, more than three-fourths of whom were Negroes.[8]

Against this context of community awareness of the serious strike affecting the principal industry in the county, a shooting occurred. At about 2:00 A. M., March 18, 1953 (the fifth week of the strike) three shotgun blasts were fired from the street through the upper sash of the front window of the home of Israel Smith, the President and Manager of the Foundry, who was sleeping in a back bedroom. No one was injured.

The Smith County Grand Jury promptly indicted Alexander, his wife and three others,[9] for "Burglary of a Private Residence

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[7] Management attempts to curb legitimate strike activity by *ex parte* restraining order and citation for contempt of *ex parte* order failed.

[8] See Newstories Exhibits 34-41, *passim*. Transcript on Motion to Quash, pp. 212-216. Typical front page headlines were: "Struck Foundry Urges Employees to Resume Jobs"; "First Violence in Strike at Western Foundry . . . "; "Contempt Charges Face Striking Western Employees"; "Foundry, Union Ready for Court"; "Foundry Drops Contempt Count Against Union"; "Foundry Strike Meeting Slated"; "Foundry Strike Talks Fail to Find Agreement"; etc.

[9] The indictments against Mrs. Alexander and accomplices Gill, Hester and Mrs. Hester were dismissed during the course of the Grady Alexander trial.

at Night Time." The indictment charged a felony under Texas Penal Code, Article 1391,[10] which makes a felony punishable by penitentiary term of five years to life, the entry into a residence at night with intent to commit a felony. Here it was alleged that Alexander "entered" the Smith home by shooting a shotgun; and that the "entry" was with the intent to murder Smith.

The Texas Statute which on its face appears to be intended for such a situation is Article 1339, Texas Penal Code,[11] which defines as a *misdemeanor,* not a felony, the shooting into a house. The penalty provided is jail term and/or fine.

The Grand Jury of which we here complain took no account of this misdemeanor statute. Conviction under the misdemeanor statute would have permitted appellant to have continued in his vocation as a union organizer.

Conviction under the felony statute resulted in the foundry and the community being forever rid of appellant as a union organizer. For Article 5154A, Sec. 4A,[12] Texas Revised Civil Statutes, prohibits one convicted of a felony from acting as union organizer, official or agent.

Alexander's Motion to Quash the Indictment on the ground that the Grand Jury which indicted him was not truly representative of the community and had been selected on the basis of a studied and deliberate exclusion of Negroes, was overruled. Alexander was convicted solely upon the testimony of an alleged accomplice and was sentenced to a five-year penitentiary term. As noted above, this felony conviction deprives Alexander of the privilege of following his present vocation.

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[10] See Appendix A, p. 15, *infra.*

[11] Reprinted in full; Appendix G, p. 31, *infra.*

[12] Section 4A of Article 5154A is reprinted herein as Appendix H, p. 31, *infra.*

The record made in support of the Motion to Quash the Indictment is overwhelming in its proof of discrimination in Grand Jury selection. For example, until 1943, not a single Negro ever served on a Smith County Grand Jury.

In the eleven years from the appearance of the first Negro on a Smith County Grand Jury, in 1943, until Alexander's indictment in 1953, twenty-four Grand Juries were impanelled. Of the 384 persons selected as grand jurors during this period, *five* were Negroes.

The extent of the discrimination appears when population statistics of record are considered. For this record clearly demonstrates that there are thousands of Negroes in Smith County qualified to serve as Grand Jurors. (S. F. p. 97.) Twenty-nine and nine-tenths percent of the population of Smith County is Negro. No reason is even suggested by this record why only five of the one thousand nine hundred and eighty-two Negro poll tax holders should have been selected as Grand Jurors in the last twelve years (S. F. p. 227), or why all but five of the three thousand eight hundred and forty-five heads of Negro families should have been ignored in composing Grand Juries. (S. F. pp. 206, 208.)

No more than one Negro served on any Grand Jury.[13] Only five Negroes have ever served on Grand Juries in Smith County, one having served once, three having served twice, and one having served on three different Grand Juries.

Moreover, these significant facts appear: of the eleven

[13]The record discloses the composition of each Grand Jury from 1942 through the 1953 Grand Jury which indicted Alexander. In each of these years two Grand Juries, each of 16 persons, was selected. A Negro served on each of the following Grand Juries: March, 1943; August, 1946; August, 1947; August, 1948; March, 1949; March, 1950; August, 1950; March, 1951; March, 1952; March, 1953. The other fourteen Grand Juries during this period did not have even token Negro representation.

Grand Jury lists upon which the name of a Negro appears, the Negro is the last or sixteenth name on nine of the eleven lists. The designation "colored" or "col." appears after the Negro's name on nine lists. Only once does the name of the Negro fall among the first twelve names.

Finally, one of the Grand Jury Commissioners who selected the very Grand Jury which indicted Alexander admitted that the Commissioners

> "deemed it advisable to surely select one member of the colored race whom we thought was qualified... we did not deem it advisable to have more than one."

ARGUMENT

The indictment returned by the discriminatorily selected Grand Jury arose out of an incident at the heart of an economic struggle of a large segment of the "Negro community" in Smith County, Texas. If there were those in Smith County who would "keep the Negro in his place" by denying him such citizenship status as would result in non-discrimination in make-up of Grand Juries, would not those same persons view with alarm the strike activities of union organizer Alexander, who, by aiding in strike action at the principal industry in the county, was not only upsetting established economic strata, but was wreaking havoc with established social patterns of segregation?

Alexander was a leader of a non-segregated union in a community where segregation was the established pattern; where church, school, business establishment, drinking fountain, toilet facility, intrastate transportation, every form of social intercourse, were founded on the discredited premise that the Negro is inferior and a second class citizen. See Gunnar Myr-

dall, *An American Dilemna,* Harper's, 1944, Vol. 1, First Edition, *passim,* particularly at pp. 443, 444.

Community resentment against the white man who would aid Negroes in breaking down segregation barriers is even greater than is the resentment against the Negro himself.

Myrdall's definitive work summarizing the objective sociological research in southern communities, of which Smith County, Texas is typical, concludes:

> "A white man who becomes known as a 'nigger lover' loses caste and is generally ostracized if not made the object of violence. Even a Southern white child feels the caste solidarity and learns that he can insult an adult Negro with impunity.
>
> * * *
>
> "The mechanism of the caste struggle in the South can be illuminated by observing more closely what happens when a person breaks caste solidarity. On the white side this exceptional person is called the 'nigger lover.' To be known by this characterization means social and economic death. Except for legal differences, such a person is virtually dealt with as a traitor in (679) fundamentally the same sense as a citizen who, during the war, is in friendly contact with the enemy. The 'scab' who goes over to the employer during a strike is another appropriate comparison. The disgrace and the persecution of the 'nigger lover,' the traitor and the labor 'scab' is fundamentally independent of their motives. These will usually and unquestionably be presumed to be base. No explanation is accepted. The reason is in all three cases that they are considered dangerous to the interests of the group. In recent years the 'nigger lover' has generally been associated with the 'reds' and the 'Communists,' terms that in all America and particularly in the South are given a wide and vague meaning.
>
> "Interracial workers in the South have to tread carefully in order not to invoke this terrible condemnation of being

'nigger lovers.' They know — and their Negro friends 'understand' — that they will have to avoid breaking such social etiquette as would 'offend public opinion.' I have repeatedly been informed by white participants in interracial work about the fine diplomacy involved, about the compliant understanding of the Negroes, and of the tremendous importance of this matter both to their own welfare and to the success of their interracial undertakings. The Negroes in the South, knowing the whites' treatment of 'nigger lovers' and the probability that they themselves would come in for a share, often show considerable shyness with a friendly white man, until they feel sure that he is going to leave the community soon and that he will not advertise his friendliness. The fear of being stamped as 'nigger lovers' on the part of the white interracialists accounts for their preference to 'work quietly' and for their reluctance to appeal to the white masses. By working only with the 'best people of both races' they hope, and have actually succeeded, in gaining social respectability for their strivings. But they always stress that they are treading upon a volcano, even if white solidarity is apparently losing some of its fury."[13A] Myrdall op. cit. pp. 677-679.

All this being shown, the Texas Court's error in holding that Alexander, not being a member of the Negro race, could not attack the indictment is clear deprivation of rights of due process and equal protection.

To hold that only Negroes may complain that juries are discriminatorily selected is to view the question as one of accommodating the races. This Court in *Cassel v. Texas,* 339 U. S. 282 (1951), 70 S. Ct. 629, made explicit that due process and equal protection required jury selection regardless of race—not, as the Texas Court here permits—on account of it.

[13A] The propriety of the court taking judicial notice of southern attitudes on race relations is clear. See Chas. S. Mangum, Jr., *"The Legal Status of the Negro,"* Univ. of North Carolina Press, 1940, at pp. 18, 25, and cases there collected.

A white man organizing Negroes in an East Texas community in which discrimination against Negroes is as obvious as is disclosed by this record, is even less likely to obtain fair and impartial consideration from a discriminatorily selected Grand Jury than is a Negro. Alexander—organizing Negroes—is entitled to the same rights as those whom he was organizing. Particularly is this so when the offense charged allegedly arises out of the labor dispute in which Negroes, organized by Alexander into an unsegregated union, are engaging in strike action. What better opportunity for those who seek to perpetuate racial discrimination than to utilize a "white" Grand Jury to discriminate against one who is leading a mixed union —predominantly Negro—in protest against their working conditions?

This Court has been explicit in a long line of cases, most arising in the Texas Courts, in requiring that there be no discrimination "in the selection of jurors on racial grounds," *Hill vs. Texas,* 316 U. S. 400, 404, 62 S. Ct. 1159 (1942); *Avery v. Georgia,* 345 U. S. 559, 73 S. Ct. 891 (1953); *Smith v. Texas,* 311 U. S. 128, 61 S. Ct. 164 (1940); *Pierre v. Louisiana,* 306 U. S. 354, 59 S. Ct. 536 (1939); *Cassell v. Texas,* 339 U. S. 282, 70 S. Ct. 629 (1950); *Akins vs. Texas,* 325 U. S. 403 (195—); *Hernandez v. Texas,* .....U. S. ....., 74 S. Ct. 667 (1954).

The last cited case was decided by this Court while the instant case was pending in the Texas Court of Criminal Appeals. Nevertheless, the Texas Court effectively ignored the fact that it had been reversed in the *Hill, Smith, Cassell* and *Hernandez* cases and refused to permit Alexander to even question the selection of the Grand Jury which indicted him. We respectfully suggest that the Texas Court should be made to understand that the Constitution requires that there be no discrimination on racial grounds in selection of Grand Jurors.

Apparently from the disposition of the instant case, the Texas Court is not yet convinced of the requirement.

We have shown that certiorari should be granted both to assure to Alexander his constitutional rights and to point to the Texas Courts the necessity of deciding federal questions of substance in accord with applicable decisions of this Court.

The petition has merit on even broader grounds. Racial patterns in the South are fast shifting toward a realization of the dignity and equal status before the law to be accorded all men. In general, this shift is peaceful. Yet there are those throughout the South with such deep "convictions" as to "white supremacy" that sporadic outbursts may be expected to arise in the process of educating and evolving toward a recognition of the civil rights of all men.[14] Individuals and organizations must surely aid in the educational and evolutionary process. The National Association for the Advancement of Colored People; Labor Unions; Church groups; the American Civil Liberties Union; these, and a host of others, may be expected to be vigilant in advancing the economic status and guarding the civil rights of the Negro. In doing so they are bound, in some in-

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[14] This Court may judicially notice the public utterances of the Governor of Texas—recently renominated by narrow margin—viz.:

Dallas Morning News, Friday, June 11, 1954, page 2, column 4:

"He (Governor Shivers) branded two recent U. S. Supreme Court decisions—that on segregation and the Phillips gas rate case—as 'the worst violation of States' rights in history'.

"Shivers attacked those of the white race who agitated racial bitterness. He said he had less respect for white agitators than the Negro who carries out the agitators' plans."

Dallas Morning News, Tuesday, June 22, 1954, Part I, page 7, column 4:

"Shivers also blasted the U. S. Supreme Court's recent ruling banning segregation in Public Schools.

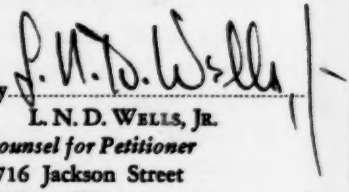
" 'As far as I am concerned,' he said, 'we are going to keep running the public schools of Texas as they are today'."

stances, to conflict with local culture patterns, local prejudices, and local officials. Are white representatives of such organizations to be subject to local prejudice and discrimination? When they urge denial of constitutional rights, may a State Court tell them: "Because of your race we will not hear your complaint"?

CONCLUSION

The petition for writ of certiorari should be granted, and the conviction reversed.

Respectfully submitted,



By .....
L. N. D. WELLS, JR.
Counsel for Petitioner
1716 Jackson Street
Dallas 1, Texas

September 13, 1954

MULLINAX & WELLS
Of Counsel

APPENDIX "A"

Art. 1391. (1305-12-13) Penal Code of the State of Texas Burglary of Private Residence at Night

The offense of burglary of a private residence at night is constituted by entering a private residence by force, threats or fraud, at night, or in any manner by entering a private residence at any time, either day or night, and remaining concealed therein until night, with the intent, in either case, of committing a felony, or the crime of theft. The term "private residence," as used herein, means any building or room occupied and actually used at the time of the offense by any person as a place of residence. One guilty of burglary of a private residence at night shall be confined in the penitentiary for any term not less than five years. Such burglary is a distinct offense, and nothing making it such shall alter or repeal the two preceding articles. Act June 5, 1899; Acts 1899, p. 318.

APPENDIX "B"

No. 26,780

GRADY ALEXANDER, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Smith County

OPINION

This is a conviction for nighttime burglary of a private residence; the punishment, five years in the penitentiary.

At the outset, we are confronted with the attack upon the sufficiency of the indictment, the charging portion of which reads as follows:

> "Grady Alexander did, then and there unlawfully in the nighttime, commit the offense of burglary, by then and there discharging firearms, to-wit: a shotgun, into the house of Israel Smith, with the intent then and there of committing a felony, to-wit: he, the said Grady Alexander did then and there with malice aforethought, discharge said shotgun into said house with the intent then and there to kill and murder Israel Smith; the said Israel Smith then and there being in said house, said house being then and there the private residence of the said Israel Smith, and then and there controlled and occupied by the said Israel Smith as a dwelling house; and he, the said Grady Alexander, did then and there shoot and discharge said shotgun into said house as aforesaid, without the consent of the said Israel Smith."

It is apparent that the state was here attempting to charge the crime of nighttime burglary of a private residence under Art. 1391, V. A. P. C., and that the felony intended was the murder of Isreal Smith, the occupant of the residence at the time. We find it to be sufficient to allege a burglarious entry. Broner v. State, 200 S. W. 2d 191, overruling Shackelford v. State, 203 S. W. 600, on this point.

Smith, the alleged injured party, was the president of the Western Foundry Company in Tyler. Appellant was the representative of the International Moulders and Foundry Workers Union of North America. The members of the local of that union, about seventy-five per cent of whom were Negroes, were employees of the Western Foundry

Company. For some time prior to March 18, 1953, differences had arisen between the foundry company and the local union. In connection with efforts of the union to obtain a renewal of its contract, Smith had sought to have defendant jailed for contempt. Appellant had been heard to say, "Well, I'm going to kill that God damn Jew son of a bitch," referring to Smith.

Smith's one-story brick residence faced Belmont Avenue in Tyler. On the front side of the residence was a bedroom with two windows. Those windows were screened, and on the inside were metal blinds. The walls of the room were nine feet high. The top of the windows was something like twelve inches from the ceiling, the bottom being some 2½ feet above the floor. The house was situated upon what might be called a double terraced lot with two separate series of steps of five steps each. From the edge of the street to the house was a distance of thirty-five or forty feet. The windows of the bedroom were something like fifteen or eighteen feet higher than the street.

About two o'clock, A.M., on March 18, 1953, Smith was awakened by two shotgun blasts. He went immediately to the bedroom above described, where his twelve-year-old son was sleeping. There he found that No. 6 shot from a shotgun had been fired into the room and through the upper sash of the window. Some of the shot had penetrated the room and lodged in the ceiling and upper window sash and some had penetrated the metal blind. Glass from the window was scattered over the room and the bed. No person suffered an injury as a result of the shooting.

Smith had never occupied the room as his bedroom. The room he and Mrs. Smith occupied as their bedroom was not on the Belmont Avenue side of the house but was situated back of the room above mentioned.

The indictment charged that appellant fired the shots into the house with the intent to murder Smith.

To show such intent, the state relies upon the testimony of Mrs. Charles Hester, who had been indicted for the same offense for which appellant was on trial and who was therefore an accomplice witness, as a matter of law. The trial court so recognized and charged the jury that the witness was an accomplice.

Mrs. Hester testified that on the night of the shooting appellant came to her home and asked to borrow her husband's shotgun. Hester, the husband, delivered it to the appellant, advising him that it was loaded. Appellant then stated to Hester that "he had something big up" and that he wanted to show him something. Thereupon, Mrs. Hester carried her baby to appellant's automobile, which was parked near the front of the Hester home, and was there joined by appellant and her husband a short while later. James Gill and appellant's wife were in the car at the time. At appellant's request, Hester drove the automobile to Belmont Drive, the street upon which the Smith home was situated. Appellant told Hester that he was "going to fix Mr. Smith up," and directed him to drive around the block to a side road, where appellant disconnected the tail lights of the automobile. The automobile was then driven past the front of the Smith home, at which time appellant fired three blasts from the gun in the direction thereof. Immediately after the shots were fired, appellant said, "I bet that scared him," and then he told Hester to "Step on it." Prior to the shooting, James Gill had told appellant that he had "been in there two or three times, and Mr. Smith sleeps in this front bedroom."

As the car was being driven to the home of Mrs. Alexander, appellant's mother-in-law, appellant cut up the three empty shells from the gun and threw them out of the car. After reaching Mrs. Alexander's home, James Gill, at appellant's direction, hid the shotgun in the "loft" of her home.

The appellant did not testify.

The facts set forth in the two preceding paragraphs are shown, solely, by the testimony of the accomplice witness.

It is insisted that no facts were introduced in evidence sufficient to provide the corroboration of the accomplice witness necessary to authorize the conviction.

It becomes necessary to examine the record for such corroborative evidence.

Outside of and other than the testimony of the accomplice, it was shown: (a) The shotgun was found by the officers three days after the shooting, at Mrs. Alexander's home. The gun was wrapped in a newspaper and no fingerprints were found thereon. After the gun

was found, its possession was traced and, upon the trial, it was identified by the accomplice as belonging to her husband. (b) About three o'clock, A.M., being about an hour or hour and a half after the shooting, appellant and his wife drove into a filling station in their Lincoln automobile and purchased "some Seven Ups." (c) Mrs. J. D. Hester, the mother of Charles Hester, testified to a conversation she had with the appellant at her home in the presence of her son Charles and Mrs. Charles Hester, the accomplice witness. The conversation took place after the appellant, Charles Hester, Mrs. Charles Hester, and others had been arrested and charged with the offense here involved. The witness testified that appellant came to her home at night and asked to see Charles Hester. When her son arrived she left the room temporarily. Upon returning, the appellant, Charles Hester, and Mrs. Charles Hester engaged in conversation, "talking about the shooting out at Israel Smith's house," in the course of which appellant said, "Charles, look. Now you know that we got into this together, and we've got to get out of it together.... We are in this just alike, all of us together, and we've got to get out together." Thereupon, the witness stated to appellant: "Charles was in bed asleep and you come over and got him and took him with you ... You know that you are old enough to be his daddy, and you have tore down here in one night what I've built up all these nineteen years in Charles." Apellant replied, "I'm sorry. That's the truth, but still, we are in this and we've got to get out." In that connection, the witness further testified: "He (appellant) was just talking to Charles about the union wanted to represent them, just like it was them. He said that they were all five in it together."

The test often applied by this court as to the sufficiency of corroboration is to eliminate from consideration the testimony of the accomplice witness and see if there be inculpatory evidence which tends to connect the accused with the commission of the offense. Durham v. State, 106 Tex. Cr. R. 85, 290 S.W. 1092; Fitzgerald v. State, 140 Tex. Cr. R. 359, 145 S.W. 2d 190.

Summarizing, it may be said that outside of and other than the testimony of the accomplice, it is shown that: Someone fired two blasts (which is the number Smith said he heard) of No. 6 shot from a shotgun into Smith's home. There was ill-feeling existing between appellant and Smith, and appellant, prior to the shooting, had threatened

to kill Smith. On the night of and after the shooting, appellant and his wife drove into a filling station in their Lincoln automobile and purchased some bottles of Seven-Up.

Some time after the shooting into the house, appellant and four others were arrested and charged with the offense which grew out of the shooting.

In discussing the shooting and the arrest or accusation with two of the arrested parties, and in an endeavor to have them agree to the use of the same counsel, the appellant made a statement to the effect that he and the two other arrested parties were "in this together" and had to "get out together," and that it was true that he had gotten Charles Hester out of bed and "took him" with him.

These inculpatory statements of the appellant constituted an admission of guilt and we find the evidence sufficient to corroborate the accomplice witness.

The charge of the court is claimed to be erroneous in several particulars. The first is presented in connection with the contention that the indictment failed to allege that appellant made an assault upon Israel Smith.

Early in the charge, the trial court said: "The indictment in this cause alleging burglary with intent to commit a felony, to-wit assault with the intent to murder with malice aforethought, it is necessary that the Court define to you both the crime of burlary of a private residence at night time, and also the crime of assault with intent to murder with malice aforethought."

Following this statement, the charge defines burglary of a private residence and defines entry in accordance with the provisions of Art. 1393 P.C. as including "by the discharging of firearms into the house with intent to injure any person therein."

Then follows the statement, in the charge, "The use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or degree of violence, is an assault." Other definitions given by the court prior to the application of the law to the facts include that of aggravated assault with a deadly weapon, murder with malice aforethought, and "murder without malice."

A deadly weapon was defined to be "one which from the manner used is calculated or likely to produce death."

It is apparent that the trial court recognized that, though the indictment did not specifically charge and the proof did not show that appellant actually committed violence upon the person of Israel Smith, it was essential that the state prove that appellant fired the shots with intent to commit murder. In applying the law to the facts the court did not authorize a conviction upon a finding that appellant discharged the shotgun into the house with intent to commit "an assault" with intent to murder, but instructed the jury that if appellant discharged the shotgun into the house with the specific intent to kill Smith with malice aforethought he would be guilty as charged in the indictment.

The legal effect of the charge, as given, is that one is guilty of the felony offense of burglary of a private residence at night if he shoots into the private residence of another with intent thereby to murder one who is at the time an occupant of the house.

It should be noted that in burglary cases it is not material whether the intent to commit the felony is actually carried into effect or only demonstrated by the attempt, or by some overt act, to be decided by the jury from the facts in evidence. Wilburn v. State, 41 Tex. R. 237; Burke v. State, 5 Tex. Court of Appeals 74.

We find no such error in the charge in regard to the definitions and preliminary instruction as will call for reversal of the conviction. Art. 666 C.C.P.

Appellant next complains that the jury was not instructed to the effect that if appellant fired the gun into the house willfully or maliciously and without an intent to kill, he would be guilty of a violation of Art. 1339, V.A.P.C. Said article provides, among other things, that if one wilfully or maliciously fires a gun at, against, or into any private residence, he shall be guilty of a misdemeanor and punished as therein provided. The issue of intent, other than arises out of malice or wilfullness, it not an element of that offense.

Appellant requested the following charge, which was given:

> "You are instructed that even though you should find and believe from the evidence beyond a reasonable doubt that the

defendant, Grady Alexander, discharged a shotgun into the private residence of Israel Smith at nighttime on or about the 18th day of March, 1953, that you cannot and must not convict the defendant unless you further find and believe from the evidence beyond a reasonable doubt that at the very time the defendant discharged the shotgun, if he did, into the home of the said Israel Smith, that at such time there then and there existed in the mind of the said Grady Alexander the specific intent to kill and murder with malice aforethought the said Israel Smith, and unless you so find from the evidence beyond a reasonable doubt, you will return a verdict of not guilty herein."

Thus appellant requested that the jury be instructed to acquit unless they found he intended to murder Smith with malice aforethought and his request was complied with. He cannot therefore be heard to complain that the court failed to give a contrary and conflicting charge, instructing the jury that under such finding the jury should not acquit but might convict him of malicious mischief. We are not called upon to determine whether the misdemeanor offense referred to is one which comes within the provision of Art. 694 V.A.C.C.P. providing for the submission of lower offenses to the jury, or of whether the failure to submit such misdemeanor offense would so prejudice appellant as to call for a reversal under Art 666 C.C.P.

Appellant, a white man, attacks the indictment, alleging that race discrimination was practiced against members of the Negro race in the organization of the grand jury which returned the indictment in this case. His authority for such attack is based, he asserts, upon the proposition that the union, of which a large portion were Negroes, was here involved.

Not being a member of that race, appellant could not urge (as beneficial to him) discrimination against members of the Negro race.

The evidence is deemed sufficient and no reversible error appears.

The judgment is affirmed.

WOODLEY, *Judge.*

(Delivered April 7, 1954.)

APPENDIX "B"

No. 26,780

GRADY ALEXANDER, *Appellant,*

v.

THE STATE OF TEXAS, *Appellee.*

Appeal from Smith County.

OPINION
ON MOTION FOR REHEARING

Appellant, in his motion for rehearing, complains of the refusal of his motion for a new trial based upon newly discovered evidence. The testimony presented upon this motion shows that Mrs. Hester, who testified on the main trial, stated before the trial that she wouldn't have signed "that confession but they promised (threatened) to take my baby away from me," and after the trial stated "I lied on that witness stand." It is not shown what she lied about, therefore the materiality of same cannot be appraised. The statement about her baby could be used only for impeachment purposes for which a new trial is not ordinarily granted. White v. State, 76 Tex. Cr. R. 612, 177 S.W. 93.

No abuse of discretion is shown by the trial court in refusing appellant's motion for a new trial.

Appellant again complains of peace officers appearing in the court room during the trial while armed and of one officer testifying while armed.

Such matters rest within the discretion of the trial court. In the absence of any evidence that the court abused its discretion in regard to the appearance of said officers, no error is shown.

Other contentions re-urged by appellant have been considered, and we remain of the opinion that this cause was properly disposed of originally.

Appellant's motion for rehearing is overruled.

BELCHER, *Judge.*

(Delivered June 2, 1954)
Opinion approved by the Court.

APPENDIX "C"

Final Judgment of Court of Criminal Appeals
Entered June 26, 1954

MINUTES OF COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

No. 26,780

GRADY ALEXANDER, *Apellant,*

vs.

THE STATE OF TEXAS, *Appellee.*

Appeal from District Court of Smith County, Texas.

APPELLANT'S SECOND MOTION FOR REHEARING
OVERRULED WITHOUT WRITTEN OPINION
JUNE 26, 1954

This cause came on to be heard on Appellant's Second Motion for Rehearing, and the same being considered, it is ordered, adjudged, and decreed by the Court that said motion be and the same is hereby in all things overruled.

APPENDIX "D"

Fourteenth Amendment to the Constitution of United States

(ARTICLE XIV)

"Section 1. All persons born or naturalized in the United States, and subject to the judisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

APPENDIX "E"

No. 15,234

THE STATE OF TEXAS
vs.
GRADY ALEXANDER

In the District Court of Smith County, Texas, 114th Judicial District.

Motion to Quash Indictments for Discrimination Practice by the Grand Jury Commissioners Who Selected the Grand Jury Which Returned the Indictment Against Defendant

TO SAID HONORABLE COURT:

Now comes Grady Alexander, defendant in the above styled and numbered cause, and moves the court to quash the indictment returned against him in said cause and for ground would show the following:

1.

Defendant, Grady Alexander, would show that he is a white male citizen and for occupation is international representative and organizer for the International Brotherhood of Molders and Foundry Workers Union of North America AFL. In this connection defendant would show that he resides in Smith County, Texas and is generally known and associated and is known by reputation to be the business representative and bargaining representative for the members of his said international union located in Texas, many of whom reside in Tyler and Smith County, Texas. Defendant would further show that as International Representative and business representative for the local unions in Smith County, Texas, that he also represents and is authorized to represent many negro and non-white residents of Smith County, Texas who are members of the local unions affiliated with the International Brotherhood, as well as having been certified as the representative to bargain for, represent and process grievances for and otherwise police contracts, relationships relating to work, wages, hours and working conditions between employee and certain employers of Smith County, Texas, including the prosecuting witness, Israel Smith, and the many white and non-white members of local unions affiliated with the Inter-

national Brotherhood, as well as many non-members of said union, but who are and were employees of employers in Smith County, Texas and vicinity, including the prosecuting witness Israel Smith. Defendant would further show that in his efforts to represent the interest of the many white and non-white employees of the various employers in Smith County, Texas and vicinity that this defendant's name has become generally known and associated as a person who represents and works with and for many non-white and Negro employees of employers in the vicinity of Smith County, Texas, including the Negro and non-white employees of prosecuting witness Israel Smith.

2.

This defendant would show to the court that the prosecuting witness, one Israel Smith, in his capacity individually and as president of corporations doing business in Smith County, Texas and vicinity is an employer of a large number of both white and non-white employees, including many Negro employees, and that your defendant has been for some time engaged in undertaking to negotiate and organize the white and non-white employees of the defendant and to represent employees of the local union of Molders affiliated with the International Brotherhood, of which there are many Negro members. In this capacity this defendant has been engaged in repeated labor difficulties over a long period of time and has received great and widespread notoriety through the press and radio in connection with his efforts to represent, protect and defend the interest of the many white and Negro members of his union and the many white and Negro employees of the prosecuting witness. That in this connection he has been engaged in assisting said white and Negro members in various labor disputes and in strike activity and in picketing and in bargaining for and organizing the employees of the prosecuting witness. That all of said information is a matter of general knowledge in the County of Smith and in Tyler, Texas to the entire citizenship of the County.

3.

This defendant would show further that the grand jury and all persons comprising the panel from which said grand jury was selected were white persons.

4.

This defendant would further show that the said grand jury panel

was picked and selected by a panel of jury commissioners appointed by the District Judge of Smith County, Texas for said purpose and in accordance with the terms of Texas Code of Criminal Procedure, Article 333 to 340. That the jury commissioners who selected the grand jury were all white men, the judge of the court was a white man, and that the court in picking the jury commissioners to select the grand jury for Smith County failed to select a jury commissioner who was of a non-white color or race and the District Court has throughout the entire history of the appointment of jury commissioners, never selected a Negro to serve as a jury commissioner. That no jury commissioner who selected the grand jury panel which indicted this defendant had on it a member who was of a non-white race.

5.

That long prior to the selection of the names for the current grand jury panel and the panel of jury commissioners appointed to select the grand jury panel, there has been and were numerous non-white citizens of the State of Texas and residents of said County who in every respect had been and were qualified to serve as jury commissioners to select the grand jury and to serve as grand jurors in investigating and returning indictments in criminal cases in Smith County.

6.

That the Board of jury commissioners or persons who were by law appointed by the District Court and authorized to select and appoint the persons who were to act as grand jurors and who did select the grand jurors who returned the indictment in this cause unlawfully and in violation of their respective oaths of offices and of the Constitution of the State of Texas and of the United States and of the law of the Land, did exclude and always have excluded from grand jury service all qualified non-white members including members of the colored race and of the African descent solely on account of their race and color.

7.

That at all times it has been, and was at the time of the appointment of the grand jury commissioners and the grand jury in this cause, and at the time of the return of the indictment of this cause, a custom in said Smith County to use white men exclusively for grand jury commissioners and for grand jurors to serve in any and all cases,

including indictment of felonies, and that this custom has been followed by those charged with the duty of appointing or selecting grand jurors.

8.

That since 194.... the grand jury commissioners have engaged in a discriminatory system of appointing only one grand juror as a Negro on the panel for said grand jury panel when one was selected at all. In all of the panels selected down to the present time, such a discriminatory selection and proportional selection of a Negro to serve upon the grand jury panel has in itself constituted a discrimination against the non-white races and classes of citizens resident in Smith County, Texas, and has, therefore, constituted an unfair and discriminatory grand jury, and did so constitute this grand jury. That the deliberate and intentional practice of selecting Negroes to serve upon the grand juries in Smith County, Texas, since 194.... and excluding from service on said grand jury panel more than one Negro for any one grand jury itself constitutes an unconstitutional and unlawful method of selecting grand juries and results in the discrimination of members of the non-white race from serving on the grand jury solely on account of their race and color.

9.

Defendant would further show that the grand jury commissioners in addition to the basis of discrimination herein set out have selected members for the grand jury and did select members for the grand jury that returned the indictment in this case without having made a thorough and detailed study to determine the number of men qualified for grand jury service that were available in Smith County, Texas, and failed to familiarize themselves fairly with the qualifications of the eligible jurors of the County without regard to race and color and said failure resulted in racial discrimination in failing to select a true representative grand jury from all eligible citizens of Smith County. Defendant is entitled under the constitution of the United States to have charges against him considered by a jury in the selection of which there has been neither inclusion or exclusion because of race and defendant has been deprived of this constitutional right by the selection of the grand jury which returned this indictment and by the system and custom in selecting grand jurors in Smith County, Texas, at least since 1940 in that no time since 1940 has a grand jury been

selected in Smith County, Texas on the basis of individual qualification without regard to racial or color characteristics.

10.

In this connection defendant would show that according to the 1950 census there were 74,701 inhabitants in Smith County, Texas, of which 29.9 were of the non-white race. That of the total inhabitants 36,614 were male citizens of Smith County, and of this number 10,735 were male non-white citizens of Smith County.

WHEREFORE, premises considered, this defendant prays that the court examine into the facts herein charged and of the violation of his constitutional rights by depriving him of the equal protection of the law, as well as due process of law, as guaranteed under the 14th Amendment of the Federal Constitution and upon final hearing hereof this defendant prays that the court quash the indictment in this cause and that the said indictment be adjudged and decreed to be null and void and that this defendant be discharged under said indictment and he prays that the court make such other orders and decrees in the premises protecting the constitutional rights of this defendant as justice and the law demands.

MULLINAX & WELLS
By /s/ OTTO B. MULLINAX
Otto B. Mullinax
Attorney for Defendant
1716 Jackson Street
Dallas, Texas
/s/ GRADY ALEXANDER
Grady Alexander

Comes now the defendant, Grady Alexander, in the above matter and states on oath that he is cognizant of the foregoing facts set out in the foregoing motion and upon oath states that the facts herein set out are within his knowledge true and correct.

/s/ GRADY ALEXANDER
Grady Alexander

Subscribed and sworn to before me this 9th day of May, 1953.

/s/ J. O. DAUGHTRY
Notary Public in and for Smith County, Texas.

APPENDIX "F"

The error of the Trial Court in overruling defendant's Motion to Quash the Indictment for Discriminatory Practices of Grand Jury Commissioners.

APPENDIX "G"

Art. 1339. Penal Code of the State of Texas Throwing or Firing Into Car, Etc.

Whoever shall wilfully or maliciously throw a stone or other missile or fire any gun or pistol at, against or into any engine, tender, coach, passenger car whether moving or not, or any other car of any moving train on any railway, or any railway depot, or any private residence, school house, church house, court house, store house, hotel or other public or private building, private or public tent, sailboat or steamboat, shall be fined not less than five nor more than one thousand dollars or be confined in jail not less than ten days nor more than two years

APPENDIX "H"

Article 5154 A, Sec. 4a. Revised Civil Statutes of Texas

It shall be unlawful for any alien or any person convicted of a felony charge to serve as an officer or official of a labor union or as a labor organizer as defined in this Act. This Section shall not apply to a person who may have been convicted of a felony and whose rights of citizenship shall have been fully restored.

26

FILED
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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 342

GRADY ALEXANDER,
Petitioner,

vs.

THE STATE OF TEXAS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN BEN SHEPPERD
Attorney General of Texas

MILTON RICHARDSON
Assistant Attorney General

W. EDMUND NOTESTINE
Assistant Attorney General
Capitol Station
Austin, Texas

HARRY LOFTIS
Criminal District Attorney
Smith County
State of Texas
Tyler, Texas

Attorneys for Respondent

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes respondent, the State of Texas, and files this its brief in opposition to the petition for writ of certiorari.

Opinions Below

Neither the original opinion of the Court of Criminal Appeals of Texas, dated April 7, 1954, nor the opinion on rehearing, dated June 2, 1954, is yet reported. Both opinions are printed in the petition.

Jurisdiction

Petitioner invokes jurisdiction under 28 U.S.C. Sec. 1257 (3).

Question Presented

Is it a denial of equal protection of the laws to try a white defendant under a burglary indictment issued by a grand jury if Negroes have been systematically excluded from that grand jury?

Constitutional Provision Involved

The Constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States.

Statement

On April 10, 1953, the Smith County Grand Jury indicted Grady Alexander, a white man, for Burglary of a Private Residence at Night, a felony under Article 1391, Texas Penal Code (Vernon 1948). (Tr. p. 4). Alexander moved to quash the indictment on the ground that Negroes were systematically excluded from the grand jury which returned the indictment. (Tr. pp. 31 to 36). In the hearing on this motion, two hundred and thirty-one pages of testimony were produced. The motion was found to be without merit and overruled. (Tr. p. 37). Alexander was convicted upon the testimony of an accomp-

lice witness sufficiently corroborated by inculpatory evidence. (Opinion of the Court of Criminal Appeals, Petition, p. 20.) The conviction was affirmed by the Court of Criminal Appeals on April 7, 1954, and a motion for rehearing was overruled by the Court on June 2, 1954. A second motion was overruled on June 26, 1954.

Argument

I.

Petitioner, a white man, complains that he was indicted by a grand jury selected on a basis of systematic exclusion of Negroes, and maintains that this constitutes a denial of equal protection as guaranteed by the Fourteenth Amendment to the Constitution of the United States. Petitioner maintains that "certiorari should be granted both to assure to Alexander his Constitutional rights and to point to the Texas Courts the necessity of deciding federal questions of substance in accord with applicable decisions of this Court." (Petition, p. 13). Assuming that there was in fact a systematic exclusion of Negroes from the grand jury, this argument is without merit and not supported by the cases which Petitioner cites. (Petition, p. 12). In each of these cases, the appellant argued a denial of equal protection on the ground that there had been a systematic exclusion of the members of his own class from one or both of the juries, and this Court decided these cases on that basis. In *Hernandez v. Texas*, ___ U.S. ___, 74 S.Ct. 667 (1954), Mr. Chief Justice War-

ren, speaking for the Court, summarized the previous holdings of this Court:

> "In numerous decisions, this Court has held that it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury, or before a petit jury, from which all persons of his race or color have, solely because of that race or color, been excluded by the State, whether acting through its legislature, its courts, or its executive or administrative officers. Although the Court has had little occasion to rule on the question directly, it has been recognized since Strauder v. State of West Virginia, 100 U.S. 303, 25 L.Ed. 664, that the exclusion of a class of persons from jury service on grounds other than race or color may also deprive a defendant who is a member of that class of the constitutional guarantee of equal protection of the laws."

In the instant case, Petitioner was not a member of the class which he claims was excluded from the grand jury.

II.

Petitioner makes no showing of prejudice to himself because of any exclusion of Negroes from the grand jury, and such a showing, if made, would be rebutted by the fact that the trial jury, admittedly

chosen without racial discrimination, heard the evidence and found the Petitioner guilty beyond a reasonable doubt. This result was affirmed on appeal.

Petitioner, in his Statement of the Case, intimates that he was improperly indicted under Article 1391, Texas Penal Code (Vernon 1948). (Petition p. 6). The offense of burglary under this Article consists of entering a private residence at night with the intention of committing a felony. Article 1393, Texas Penal Code (Vernon 1948)[1] defines "entry" as including the discharge of firearms into a house. The Texas law is well stated in *Garner v. State*, 31 Tex. Crim. 22, 19 S.W. 333 (1892):

> "To discharge firearms into a house with intent to injure any person therein is per se burglary, and constitutes all the force and entry necessary and essential to that crime."

See also *Cordero v. State*, 132 Tex. Crim. 93, 103 S.W. 2d 157 (1937).

In the present case, the trial jury found from the evidence beyond a reasonable doubt that the Petitioner discharged the shotgun into Israel Smith's house with the specific intent to kill and murder with malice aforethought the said Israel Smith. (Tr. pp. 62, 63).

III.

Petitioner maintains that the grand jury which indicted him was selected on the basis of a studied and deliberate exclusion of Negroes, and Petitioner

[1] See Appendix A, p. 13.

has the burden of proving his charge. *Hernandez v. Texas*, ____ U.S. ____, 74 S.Ct. 667 (1954). The Trial Court heard the evidence introduced by Petitioner to support this claim, and overruled the Motion to Quash the Indictment. (Tr. p. 37). The Record supports this ruling of the Court and clearly demonstrates that there was no discrimination in the selection of the grand jury.

The period considered at the hearing was March, 1942 to March, 1953. Of the 324 persons impaneled as grand jurors during that time, at least ten were Negroes.

There was no showing at all of how many Negroes were qualified to serve as grand jurors. Petitioner's most favorable testimony on this point was given by a Negro who had served on a grand jury in Smith County. Petitioner refers to this testimony to support his statement that the "record clearly demonstrates that there are thousands of Negoes in Smith County qualified to serve as grand jurors." (Petition, p. 8). The actual testimony is as follows:

> "Yes, bearing those qualifications in mind, I know quite a few other Negroes in Smith County, Texas, who are qualified to serve as grand jurors in this County. Yes, I know a lot of such Negroes. It would take from now until night I expect to name all I know. To the best of my knowledge, I would say that there are several hundred such Negroes in Smith County, Texas. Sure, there could be as many as a thousand."

Petitioner's own evidence shows that of the 11,514 qualified voters in Smith County in 1953, 1,982 were colored. (S.F. p. 227). Of these 1,982, only males are qualified to serve on a grand jury, and then only if they are freeholders or householders, of sound mind and good moral character, with the ability to read and write, who have not been convicted of any felony, and are not under indictment or other legal accusation for theft or a felony. Article 339, Texas Code of Criminal Procedure (Vernon 1948)[2]. No evidence was introduced to show how many of those qualified to vote possessed the additional qualifications required of grand jurors. The evidence is insufficient to establish a presumption that there has been a purposeful, systematic non-inclusion of Negroes because of their color or race.

The real issue is whether there was discrimination in the selection of the jury that indicted petitioner. The testimony of the Jury Commissioners who selected the grand jury is sufficient not only to rebut any presumption which Petitioner might have raised, but also to establish affirmatively that the grand jury was selected without discrimination:

Commissioner Adams:

> "I was born here in 1913 and have lived here in Tyler all of my life. I consider quite a few of the colored people are friends of mine. My father formerly worked them and my grandfather, and I think I've got

[2] See Appendix B, p. 13.

quite a few of them who are friends of mine. Yes, in the 50% that I estimated one of the three Grand Jury Commissioners knew personally, that would include both white and colored race. Yes, within that 50% some of those people whom we considered were colored people. Yes, we selected these persons from the group one of the three of us knew. According to my recollection there was no discrimination against a colored person as we were checking their qualifications. As their name came up, we asked if one or the other might know them. Yes, that is the way I looked at it, based solely on their qualifications without regard to race. Yes, it is correct that I deemed it feasible that at least one Negro be on the Grand Jury. No, it was not my intention to just limit it to one ... I looked at them solely upon qualification and still do.

"It is my recollection that there was no distinction on the poll tax list as to Negroes ... No, there was no criteria for us in determining the number of Negroes we were to select for a Grand Jury. (S.F. pp. 62 to 63).

Commissioner Brady:

"As a Grand Jury Commissioner, the qualifications that we looked for as we went through that list were people that we knew were good men, that one of the three of us knew, and we picked them out over the county where we would have a good repre-

sentation. Yes, I mean so that we would have people from all parts of the county . . . There were plenty of people that we knew over the county that were good men to select on this list and some to spare as to that. As to the method we used, we taken it mostly by sections, one good man to the section . . . We tried to do that, yes, sir, to sort of mentally divide the county up. When we decided that we should have a person from a certain part of the county, we would go about selecting the person by trying to think who in this locality would make a good juror. When one of the Commissioners would mention a good man from a part of the county whom he thought would make a good man, we would all discuss his qualifications. If only one man knew him, the other two would question the one man about his qualifications and what kind of a man he was. Yes, we would check to see if he was on the poll tax list, and if we decided on him, the three of us would concur in the selection.

"Yes, when we were selecting the sixteen men, we took into consideration their general reputation around their community. No, we didn't consider their ability to serve as to whether they would lose wages or income. No, we didn't take into consideration their financial standing in their particular community. Yes, we based it on their reputation as we knew it to be. Our criteria as to their reputation as we knew it was according to a man's standing, social standing in the community, whether he got along

with people, was a good man or not. In one sense, if we knew anything that would be shady on a man, we would not select him. If we knew anything that a man had done that wasn't right, we wouldn't select him as a juror . . . Before we selected these sixteen men, I imagine we considered three or four times that many . . . No, I don't know exactly how many out of that approximate number were white and how many colored. . . . Yes, there were other Negroes than Mr. Pryor discussed. I felt that this one Negro and the fifteen white men whom we selected were as good or the best qualified that we could select." (S.F. pp. 67 to 75).

Commissioner Nenney:

"We knew Mr. Pryor was a Negro, and we selected him on the Grand Jury, so naturally we discussed the fact that he was a Negro. . . . Yes, I knew Mr. Pryor before this time. Yes, I know several other Negroes whom I consider equally qualified with Mr. Pryor to serve as Grand Jurors. Yes, in my mind, I considered those persons. No, I don't believe we compared any of our selection of Grand Jurors one with another. I think we just selected them, and when we selected one, we put his name down. We were going around in districts. As to whether it is possible that there were qualified men that we did not consider, we thought that we were charged to get 16

qualified Jurors, and when we had gotten those, we were not discriminating against anyone. We felt like we had fulfilled our duty as a citizen.

"We did not reject any men because they were Negroes. . . . Yes, it is true that there were many qualified white men, as well as Negroes, on that list of such a tremendous number of names that were not considered. . . . we did the best of our ability to pick the best qualified men in this county to serve as Grand Jurors. That was without race, color, or creed entering into it. We did not say, 'We have one Negro on this and that's enough.' The race, color or creed did not enter into our selection of sixteen qualified men." (S.F. pp. 80 to 82).

It is clear from this testimony that the Commissioners honestly exercised relevant judgment in choosing the grand jury which indicted Petitioner. The Commissioners were personally acquainted with a large number of potentially qualified Negroes. They selected one of these, and he served on the jury in question. They considered the Negroes with whom they were acquainted just as they considered white persons with whom they were acquainted, and those which were not selected were found to be unqualified or unavailable.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN BEN SHEPPERD
Attorney General of Texas

MILTON RICHARDSON
Assistant Attorney General

W. EDMUND NOTESTINE
Assistant Attorney General
Capitol Station
Austin, Texas

HARRY LOFTIS
Criminal District Attorney
Smith County
State of Texas
Tyler, Texas

Attorneys for Respondent

A copy of this Reply, together with a copy of the letter of transmittal to the Clerk of the United States Supreme Court, have been mailed this date to L. N. D. Wells, Jr., Mullinax & Wells, 1716 Jackson Street, Dallas 1, Texas, Attorney for Petitioner. (First Class Postage Prepaid.)

APPENDIX "A"

Texas Penal Code. Burglary.

Art. 1393 [1307] [841] [707] "Entry" further defined

The entry is not confined to the entrance of the whole body; it may consist of the entry of any part for the purpose of committing a felony or theft, or it may be constituted by the discharge of fire-arms or other deadly missile into the house, with intent to injure any person therein, or by the introduction of any instrument for the purpose of taking from the house any personal property, although no part of the body of the offender should be introduced. O.C. 726.

APPENDIX "B"

Texas Code of Criminal Procedure. Organization of the Grand Jury.
Art. 339 [390] [378]. Qualifications

No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

2. He must be a freeholder within the State, or a householder within the county.

3. He must be of sound mind and good moral character.

4. He must be able to read and write.

5. He must not have been convicted of any felony.

6. He must not be under indictment or other legal accusation for theft or of any felony. Acts 1876, p. 78; O.C. 289; Const., art. 16, sec. 19; Acts 1903, 1st C.S., p. 16.

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No. 342

IN THE

Supreme Court of the United States

GRADY ALEXANDER,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

Petitioner's Reply to State's Opposition to Application for Writ of Certiorari

Pursuant to Rule 24(4), petitioner, Grady Alexander, respectfully files this reply to the opposition filed by the State of Texas which was served on petitioner's counsel on October 19, 1954, and for such reply petitioner would show:

1.

The State asserts (opposition, pp. 3-4) that "petitioner was not a member of the class which he claims was excluded from the grand jury." But while Alexander is white, it is undisputed that he organizes, meets with, bargains for and attempts to improve the economic status of the Negro.

The accepted position of Myrdall and other social scientists is that "class" is made of social concepts about people, rather than of their own skin color and ancestry. If we accept this view of the sociologist, Alexander is a member of the excluded class, for the "class" thus defined, against which prejudice exists, includes not only Negroes as defined by skin color, ancestry and membership in the Negro community, but also "nigger lovers." Cf. Gunnar Myrdall, *An American Dilemma,* Harpers, 1944, Vol. 1, First Edition, passim, particularly at 677-679.

If Alexander is a member of the class (and the State does not dispute the facts which make him so within the sociologist's definition), the very holding quoted at page 4 of the "Opposition" requires that the conviction here be reversed.

2.

But assume *arguendo* Alexander's lack of actual membership in the excluded class, the actual test is "identity with the excluded group" rather than actual membership in the class. *Fay v. New York,* 332 U. S. 261, 287.[1] Here Alexander clearly was identified with the excluded group.

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[1] In the *Fay* case a five justice majority, determining the constitutionality of the "blue ribbon" New York jury, expressly reserved for later decision *"whether lack of identity with an excluded group would alone defeat an otherwise well established case under the amendment."* (Emphasis added) The majority opinion there, by the late Justice Jackson, pointed out that Fay's large net income hardly put Fay in the non-blue-ribbon category. The four dissenting justices believed the blue ribbon jury, by the nature of its method of selection, was a stacked one, and hence denied due process. They therefore did not reach the issue of whether defendant need be a member of the excluded class. But it is of extreme importance that even the majority did not speak of membership in the excluded class, but rather *"identity with an excluded group."*

Assuming that we err in all we have said above; i.e. even if Alexander is neither a member of, nor so identified with, the excluded class or race so as to come within *Hernandez v. Texas,* 347 U. S. 475 (1954), and the earlier cases of race or class exclusion,[2] nevertheless, upon a showing that either the factual or legal problems at issue are such that the discriminatory exclusions could logically be related to the issues to his possible prejudice, Alexander is denied due process and equal protection and entitled to reversal. Compare *Ballard v. U. S., 329 U. S. 187 (1946); Zap v. U. S.,* 330 U. S. 800 (1947). In the opinion in the *Ballard* case this court discusses the question of the prejudice to defendants (a mother and son) resulting from exclusion of women from the jury. Yet nowhere is it suggested that prejudice to the female defendant was greater than to the male defendant. See specifically the court's lengthy quotation with approval of Judge Denman's discourse on the prejudice resulting from exclusion of women from a jury where the issues pertained to the good faith of the defendant's religious avowals (329 U. S. at 194-195). Note the following rationale in the *Ballard* case, applicable here (329 U. S. 187 at 193-194):

> "It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But if the shoe were on the

[2] *Hill v. Texas,* 316 U. S. 400, 404; *Avery v. Georgia,* 345 U. S. 559; *Smith v. Texas,* 311 U. S. 128; *Pierre v. Louisiana,* 306 U. S. 354; *Cassell v. Texas,* 339 U. S. 282; *Akins v. Texas,* 325 U. S. 403; *Hernandez v. Texas,* 347 U. S. 475.

other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less represenative of the community than would be true if an economic or racial group were excluded.

"The present case involves a prosecution of a mother and her son for the promotion of an allegedly fraudulent religious program."

In the *Zap* case this court upon rehearing, after *Ballard,* vacated its denial of certiorari, granted certiorari and reversed *per curiam,* with direction to dismiss the indictment, citing *Ballard.* Thus, while not explicit in the *Zap per curiam* opinion, it appears that this court there held that there was available to a male the defense of exclusion of women from juries.

See also the dictum in *Glasser v. U. S.,* 315 U. S. 60 (1942) where this court stated that if the male defendant there convicted had been able to prove his assertion that only women who were members of the League of Women Voters were used for the female portion of the array, his conviction would have been reversed. The pertinent language in the opinion is (315 U. S. at 86):

"* * * the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class.

* * *

"The deliberate selection of jurors from the membership

of particular private organizations definitely does not conform to the traditional requirements of jury trial. No matter how high-principled and imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when the members of those organizations, from training or otherwise, acquire a bias in favor of the prosecution. The jury selected from the membership of such an organization is then not only the organ of a special class, but, in addition, it is also openly partisan. If such practices are to be countenanced, the hard-won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions."

Note also Judge Learned Hand's dictum in the recent *U. S. v. Dennis,* 183 F. 2d 201 (CA 2, 1950) at p. 216:

> 'We will assume that any party to a suit, civil or criminal, is entitled to have the particular panel which tries his case, drawn at random from a list which is not unlawfully weighted, and that he may complain ever though he has not shown that the imbalance has prejudiced him."

While the cases cited in this section of our argument relate to composition of federal, rather than state, juries, and while we are aware that in cases involving the former the exercise of a supervisory power by this court may be more appropriate, nevertheless, the cited cases demonstrate that this court has recognized that even where the defendant is neither a member of or identified with, the class discriminatorily excluded, if he can show that either the factual or legal problems involved are such that the discriminatory exclusions could logically be related to the issues to his possible prejudice he has been denied due process and equal protection and is entitled to reversal.

It is abundantly clear that a white who associates with

negroes in East Texas communities like Smith County is generally regarded as a "nigger lover" and lower in the social scale in the eyes of the East Texas community than are the Negroes with whom he is associated.[3] See Petition, pp. 9-11.[4] And note that courts throughout the South have taken judicial notice of this fact, e.g. *Sharp v. Busey,* 137 Fla. 96, 187 So. 779 (1939) where it was said:

> "* * * This is necessarily true because it is indisputable and a matter of common and general knowledge that if a white man residing in Jacksonville Beach or any where else in Duval County, Florida, were to in truth and in fact attend dances at a negro dance hall and dance with negro women, his business and social standing would be completely wrecked. He would forfeit the respect and con-[781]fidence not only of the white people of that section, but would be held in contempt and be despised by the self-respecting negro citizens."

Compare *Axton Fisher Tobacco v. Evening Post Co.,* 169 Ky. 64, 183 S. W. 269 (1916):

> "* * * It goes much further than that, as is shown in the general feeling everywhere prevailing that the negro,

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[3] This record affirmatively so demonstrates. See testimony of Sam E. Sharp, a pillar in the community, who served upon three grand juries in six years. Interrogated by Alexander's white lawyer, Oscar Mauzy, grand juror Sharp testified, "Yes, I surely am a member of the white race, are you? You don't act it." (S.F.M.Q., p. 132).

[4] The citation of page numbers is keyed to the testimony offered upon defendant's Motion to Quash the Indictment which appears in this record from pages 149 to 428. (Referred to herein as "SFMQ.") Petitioner is financially unable to purchase a copy of the entire record, and the shortness of time has not permitted petitioner's attorney to consult the copy of the official record on file in the Court of Criminal Appeals in Austin, Texas, approximately 200 miles from his office in Dallas, Texas. Accordingly we cite throughout this reply the page of the testimony in volume entitled, "Statement of Facts on Defendant's Motion to Quash Indictment." This volume commences at p. 149 of the record. Presumably p. 132 of said motion is 149 plus 132, or page 281 of the record. We are not advised, however, as to the exact pagination in the certified record.

while respected and protected in his place, is not and cannot be a fit associate for white girls or the social equal of the white race. To conditions like these that are everywhere about them as a part of the social order and domestic economy of the state, courts cannot shut their eyes. They must take notice of the long-established and uniform custom and usage of the country in respect to the position of the races and the attitude of the white race toward the negro race.

"And so we think the publication that a negro man was placed as a boss over white girls was surely calculated to arouse the hostility not only of organized labor and wage-earners, but of all right-thinking people, to such an extent as to enforce numbers of them to withdraw their patronage from a concern publicly and widely charged with employing business methods so offensive to the sentiment and good judgment of all classes of decent, white people. That this conduct was calculated to create hostility toward the tobacco company, and to injure it in a business way, is, we think, further shown by the fact stated in the publication, that the labor unions, as a result of the charge, placed this factory on the 'unfair list.' "

See to the same effect: *Roland v. State,* 137 Tenn. 663, 194 S. W. 1097 (1917); *Manning v. State,* .....Tenn....., 257 S. W. 2d 6 (Sup. Ct. Tenn., 1953); *Watkins v. Augusta Chronicle Pub. Co.,* 439 Ga. App. 43, 174 S. E. 199 (1934); *Frank v. Herring,* 208 S. W. 2d 783 (Mo. Ct. App. 1948);

"[3, 4] In Missouri it is unlawful for Negroes and whites to attend the same school and intermarriage is prohibited by statute. It is a matter of common knowledge that Negroes and whites are segregated, by inclination and by custom, in churches, hotels, restaurants, theatres and many other public places, and that they do not intermingle socially. We will take judicial notice of our statutory law, and of the general customs and usages prevailing in our

state. Rositzky v. Rositzky, 329 Mo. 662, 46 S. W. 2d 591, loc. cit. 599; 20 Am. Jur. 84, par. 63.

"[5, 6] With all of the foregoing in mind, it is inconceivable that the people of Fulton, and of that community, would interpret the association of plaintiff with a Negro, that is, 'go with,' as meaning anything other than an immoral association. Such an association, between members of the opposite sex, ordinarily implies courtship; but such a courtship as this could not lead to a legal marriage in Missouri. An assertion that the *sheriff* had 'caught' them implied, and was meant to imply, that plaintiff had been guilty of fornication with a Negro, and had been 'caught,' or apprehended, in the commission of such an act. The very atmosphere [789] that then existed in Fulton, and which must have been known to defendant to exist, coupled with his previous false statements concerning plaintiff's keeping company with a colored man, constituted sufficient evidence upon which the jury could have found, as it did find, that defendant meant to, and did, charge plaintiff with being a fornicatress; and direct opinion evidence to that effect is found in the testimony of Mrs. Crockett and of Mrs. Anthony. In view of the historical social attitude of the white people of rural Missouri toward members of the Negro race, as the same is reflected in our laws, and well known to all informed people of this state, it is doubtful if defendant could have made a false statement of and concerning plaintiff that could have humiliated and degraded her more, in the estimation of the people of that community, and of plaintiff herself, than that made herein."

The fear of the consequence of being known as a "nigger lover" is a powerful force in Southern life. Compare Erskine Caldwell's novel, "Trouble in July," Duell, Sloan and Pearce, 1940, pp. 125, 126, 233. Compare p. 18.

Systematic exclusion of Negroes from a grand jury in a community which holds such views must certainly prejudice a defendant accused of crime in connection with a labor dis-

pute in which the economic status of the negro is the principal issue.

4.

The State in its opposition tacitly recognizes this, for it devotes three-fourths of its argument to attempting to demonstrate lack of discrimination in jury selection. (Opposition pp. 4 to 12) But the Texas courts refused to hold that there was no discrimination in the selection of the grand jury; the Texas courts held that Alexander could not raise the question. Specifically: "not being a member of that race, appellant could not urge (as beneficial to him) discrimination against members of the Negro race." Opinion of Texas Court of Criminal Appeals printed at petition pp. 16, 22.

At opposition page 7 the State asserts: "The real issue is whether there was discrimination in the selection of the jury that indicted petitioner"; yet it was this "real issue" which the Texas Court refused to consider, solely because Alexander is a white man. Our complaint is not that the issue has been determined against us, but that the State courts won't even let us raise the issue.

Assuming *arguendo* that the "real issue" had been determined by the State Court adversely to Alexander, i.e. that the Texas court had held there was no discrimination in grand jury selection, such a determination would have had no adequate support in this record and would have been contrary to the overwhelming evidence, and it would be the duty of this court to "re-examine the facts to determine whether petitioner has sustained by proof his allegation of discrimination." *Cassell v. Texas,* 339 U. S. 282 at 283, and cases there cited in footnote 1.

No amount of pious declaration and statement of conclu-

sions by jury commissioners can avoid the record facts that Smith County is 29.9% negro (S.F.M.Q. 178); there are 3,845 negro married couples in Smith County with their own household (S.F.M.Q. 208); there are 9,532 white poll tax holders and 1,982 Negro poll tax holders in Smith County (S.F.M.Q. 228). No explanation appears as to why when the ratio of negro to white poll tax holders is almost 20%, the ratio in grand jury service is only 5 to 324 or less than 2%.

Nor is there any explanation as to why the "Opposition" in purporting to summarize the testimony of the commissioners who selected Alexander's grand jury, deletes any reference to the admissions appearing in Commissioner Walter Adams' testimony that *"we deemed it advisable to surely select one member of the colored race whom we thought was qualified. No we did not deem it advisable to have more than one.* (S.F.M.Q. 60).

Nor can the State's assertion at page 6 that "of the 324 persons impaneled as grand jurors during that time, at least *ten* were negroes" (emphasis added) alter the record fact that actually only *five* were negroes, four of whom were required to render multiple service on the grand jury to preserve even a semblance of Negro representation.

In the face of such a record the State's preposterous suggestion (Opposition, page 7) that Alexander must shoulder the burden of proving that each of one thousand nine hundred and eighty-two qualified colored voters was (1) male, (2) freeholder or householder, (3) of sound mind and good moral character, (4) able to read and write, (5) not convicted of felony, and (6) not under indictment or other legal accusation hardly merits reply.

It was the jury commissioner's "duty to familiarize themselves fairly with the qualifications of the eligible jurors of

the county without regard to race or color." *Smith v. Texas*, 311 U. S. 131, 132, *Cassell v. Texas*, 339 U. S. 282, 289.

And, as this court recognized in the *Cassel* case: "... with no evidence to the contrary, we must assume that a large proportion of the Negroes of ... county met the statutory requirements for jury service" 339 U. S. at 289.

Here, even though such assumption is not made, we have the admission of one jury commissioner, and statistics of record showing gross discrimination. For here, as in *Smith v. Texas*, 311 U. S. 128 (1940): "chance and accident alone could hardly have brought about the listing for grand jury service of so few Negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service. Nor could chance and accident have been responsible for the combination of circumstances under which a Negro's name, when listed at all, almost invariably appeared as number 16, ..." (See 311 U. S. at 131; Cf. S. F. M. Q. pp. 233-258).

Smith v. Texas also disposes of the State's argument "that the testimony of the commissioners themselves shows that there was no arbitrary or systematic exclusions." For as this court well recognized "this is at best the testimony of two individuals who participated in drawing one out of 32 jury panels discussed in the record .... even if their testimony were given the greatest possible effect, and their situation considered typical that of the 94 commissioners who did not testify, we would still feel compelled to reverse the decision below." (311 U. S. 128 at 132).

5.

The State's suggestion (Opposition Point II) that the error is rendered harmless by virtue of the petit jury finding Alexander guilty has been foreclosed by this court. That was the very argument made by the late Mr. Justic Jackson dissenting

in the *Cassell* case. Mr. Justice Jackson argued (339 U. S. 282 at 302) "It hardly lies in the mouth of a defendant whom a fairly chosen trial jury has found guilty beyond reasonable doubt, to say that his indictment is attributable to prejudice..." But the majority of this court were not persuaded. They reversed the conviction. They should do so here.

CONCLUSION

Almost daily the public press reports instances of reaction often violent, by disciples of the discredited "white supremacy" theory, against public officials and private citizens attempting to carry into effect this Honorable Court's recent holding in the public school segregation cases. This reaction is directed against the white man, as well as the Negro, in the affected areas. Those leading the "white supremists" make no distinction based upon race when unleashing their poison of race hatred. The non-Negro advocate of insuring the economic well being or the constitutional liberties of the Negro is entitled to the same constitutional guarantee of due process as is the Negro himself. The evolution of the South toward equality before the law for all men demands that a state court be required to determine questions of discrimination upon the facts, and not upon the color of the aggrieved litigant.

The petition for certiorari should be granted and the conviction reversed.

Respectfully submitted,

By L. N. D. Wells, Jr.

L. N. D. Wells, Jr.
Counsel for Petitioner
1716 Jackson Street
Dallas 1, Texas

October 21, 1954
Mullinax & Wells
Otto B. Mullinax
Oscar H. Mauzy
Of Counsel

ADDENDUM

In *Buchanan v. Warley*, 245 U. S. 60 (1917), the Supreme Court recognized that a white person might attack the validity of a racially restrictive ordinance where a discriminatory effect on Negroes also affected him. The court took specific note that (page 72) "The objection is made that this writ of error should be dismissed because the alleged denial of constitutional right involves only the rights of colored persons, and the plaintiff in error is a white person." In overruling this objection the court said (page 73) "the right of the plaintiff in error to sell his property was directly involved and necessarily impaired because it was held in effect that he could not sell the lot to a person of color who was willing and ready to acquire the property and had obligated himself to take it." Similarly in *Hurd v. Hodge*, 334 U. S. 24, 34 (1948), one of the petitioners was a white person. The court repeatedly mentions his race as white in dealing with the restrictive covenant but in no wise held the white property owner less qualified to attack the restrictive covenant than the colored buyers.

CERTIFICATE OF SERVICE

A copy of this reply, together with a copy of the letter of transmittal to the Clerk of the United States Supreme Court, has been served this date on Honorable John Ben Shepperd, the Attorney General of Texas, Capitol Station, Austin, Texas, and Honorable Harry Loftis, Criminal District Attorney, Tyler, Texas, attorneys for respondent, by placing properly addressed copies of the same in the United States mails, first class postage prepaid.

L. N. D. Wells, Jr.

NO. 342

IN THE

Supreme Court of the United States

(OCTOBER TERM, 1954)

GRADY ALEXANDER,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

MOTION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI

To the Honorable Justices of the Supreme Court of the United States:

Grady Alexander requests reconsideration in the light of intervening circumstances of the Order of November 8, 1954, denying his Application for Writ of Certiorari to the Court of Criminal Appeals of the State of Texas, and respectfully urges that his Petition for Certiorari be considered in the light of the representations made by the Attorney General of Texas in his brief in the "Public School Segregation Cases" filed subsequent to denial of certiorari herein, and as cause why said writ should be granted respectfully shows:

1.

By denial of certiorari herein, this Court permits to stand a holding of the Texas Court of Criminal Appeals that *only* "a member of that (Negro) race . . . could . . . urge . . . discrimination against members of the Negro race" in attacking an indictment returned by a "white" grand jury. Specifically the Texas court held:

> "Appellant, a white man, attacks the indictment, alleging that race discrimination was practiced against members of the Negro race in the organization of the grand jury which returned the indictment. . . . *Not being a member of that race,* appellant could not urge . . . discrimination against members of the Negro race." (Emphasis added)[1]

The instant case stands alone in the history of this court in holding that the race of a citizen asserting a constitutional right determines whether issues of due process and equal protection can be raised. It seems anomalous for the court to here approve a Texas decision holding that *only* Negroes may urge this point, when, in a long line of cases, this court has been at such pains to require that "Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race". *Cassell v. State of Texas,* 339 U.S. 282 at 286.

If, as held in the *Cassell* case, "The Constitution requires . . . a . . . jury selected *without regard to race*" (Emphasis added); may State courts apply or withhold such requirements depending on the race of the litigant who asserts the right?

If the Constitution "does command that no state purposefully make jury service turn on color" (concurrence in *Cassell's* case, 339 U.S. at 291), how can the state make application of the Constitutional command contingent on the color

[1]Opinion, Texas Court of Criminal Appeals, reprinted in Petition for Certiorari, p. 16 at p. 22.

of the litigant? If jury commissioners "cannot consciously take color into account" in selecting a grand jury before which a charge against a Negro will be lodged, may the commissioners in selecting the grand jury which will consider indicting a "white" leader of Negroes consciously and purposefully exclude 29.9% of the community?

Does the court intend that Smith County, Texas, henceforth have *two* grand juries; one selected from the whole community without regard to race to consider cases against Negroes — and a second, composed only of representatives of the "white" two thirds of the community to consider all "non-Negro" cases?

The Texas court's decision in the instant case gives one race greater rights than another — and runs directly counter to every decided case in this field, all of which hold that the law acts regardless of race or color — not because of it.

Briefs filed in the "Public School Segregation Cases," since denial of certiorari herein, make clear certain matters relevant to the proper disposition of the instant case. One is that "white" men disagree as to the wisdom or propriety of this court's opinions in the Public School Segregation Cases. Out of such disagreements will arise, according to the elected chief law officers of several southern states, "passive resistance," "threats of violence" or "bloody race riots."[2]

[2]Even assuming what experience under this court's decisions in the "White Primary" and college level segregation and other civil rights cases makes abundantly clear, that the majority of the electorate in Texas and the rest of the South is more temperate than their Attorney Generals represent, nevertheless, there are many so imbued with outmoded concepts of "white supremacy" as to attempt to visit discrimination upon either Negroes or those who seed to aid the Negro in the educational and evolutionary process by which equality before the law and in industrial relations is to be achieved.

Is it intended that a Negro caught in the backwash of prejudice directed against Negroes and those who aid him may require that those who seek to jail him be representative of the whole community, while the "white" who seeks to make effective the constitutional prohibition against racially segregated public schools may be jailed by a jury composed only of the portion of the community which is white and which is bent upon maintaining "white supremacy"?

The Texas Attorney General by formal representation to this court in the Public School Segregation cases "warned the U.S. Supreme Court today (November 15, 1954) any attempt to compel desegregation of Texas public schools, except by "gradual adjustment" faces the threat of violence."[3]

None of the briefs in the Public School Segregation Cases suggests that the "passive resistance" or "bloody race riots" will be confined to those whose skin is black. The whole community is affected; white, black or brown, he who seeks to implement this court's decision is the object of opprobium from at least a segment of the East Texas community.

White, black or brown he should be afforded the protection of a jury chosen from the whole community, not just the "white" segment thereof.

3.

The briefs in the Public School Segregation Cases likewise make clear that opposition to integration in education is as

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[3]Dallas Times Herald, Page 1 lead story headlined: "SCHOOL DESEGREGATION DANGER CITED IN TEXAS." Page 1, Col. 1, Nov. 15, 1954; see also Dallas Morning News, Part 1, p. 6, November 16, 1954. Story headlined: "VIOLENCE PREDICTED IF COURT FORCES SEGREGATION END NOW."

likely to manifest itself against a "white" as a "Negro." Indeed, the social scientist has long recognized that "race" and "class" are not matters of skin color or ancestry, rather they are epithets applied to certain peoples to designate their membership in minority groups.[4]

This is typical of the Texans' attitude toward race. As the Governor of Texas recently observed: "he had less respect for white agitators than the Negro who carries out the agitators' plans."[5] Or, as Smith County Grand Juror Sharp demonstrated in testifying in the instant case, a white lawyer interrogating him in a manner of which he disapproved did not appear to him to be a member of the white race. Specifically, Grand Juror Sharp testified, "Yes, I surely am a member of the white race, are you, you don't act it." (Motion to Quash, p. 132.)

Thus, by the standards of the social scientist, or the Attorney General of Texas, or the Governor of Texas, or Smith County Grand Juror Sharp, identity with the Negro race or class depends not on skin color or ancestry, but on what those

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[4]Barzun, *Race, A Study in Modern Superstitions* (1937); Benedict, *Race: Science and Politics* (1940); Boyd, *Genetics and the Races of Man* (1950); Boas, *Race, Language and Culture* (1940); Cox, *Caste, Class and Race: A Study in Social Dynamics* (1948); Davis and Gardner, *Deep South: A Social Anthropological Study of Caste and Class* (1941); Dollard, *Caste and Class in a Southern Town* (1949); Fairchild, *Race and Nationality* (1947); Golightly, *Race, Values, and Guilt*, 26 Social Forces 125 (1947); Krogman, *The Concept of Race* in Linton (ed.), *The Science of Man in the World Crisis* (1945); Ashley-Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* (1945) and *Statement on Race* (1951); Myrdal, *An American Dilemma* (1944); Odum, *Race and Rumors of Race* (1944); Park, *Race and Culture* (1950); Powdermaker, *After Freedom: A Cultural Study in the Deep South* (1939); Radin, *The Racial Myth* (1934); Wirth, *Race and Public Policy*, 58 Scientific Monthly 302 (1944).

[5]Dallas Morning News, June 11, 1954, page 2, Column 4.

in the community think and feel.* The prejudices which deprive of seats in the jury box or in the grand jury room are aroused not so much by skin color, as by attitudes, speech or actions. The white who associates with, assists or leads the Negro is at once, in the eyes of the dominant portion of the East Texas community, so identified with the Negro as to be in the eyes of the community, worthy of the same treatment as the Negro himself.

We submit that it is not proper for the Texas court to define "class" or "race" in terms of skin color or ancestry, for as we have demonstrated, the findings of the social scientists, the evidence in this record, the public statements of the Governor of the State of Texas, all make clear that "class" or "race" is based on community attitude and social concept rather than on skin color. This being so, it is not proper to turn the Constitution on or off depending on the skin color of the litigant.

The Fourteenth Amendment precludes deprivation or denial of rights there guaranteed to "any person." Petitioner

*Introduction to the sociology of minorities in C. F. Marden's *Minorities in American Society*, American Book Co., N. Y. 1952, page 26 ff.; *Negroes in American Society*, McGraw-Hill Series in Sociology and Anthropology, New York, 1949, pp. 388 ff. Rose, Arnold M., *Race Prejudice and Discrimination*, Knopf, N. Y. 1951, p. 5 ff.; McDonough, Ed. C. and Richards, Eugene S., *Ethnic Relations in the United States*, Appleton-Autry-Crofts, Inc., 1953; W. Floyd Warner, *American Caste and Class*, American Journal of Sociology, Vol. 42, No. 2 (Sept. 1932) pp. 234-237; Hartley, E. L. and Hartley, R. E., *Fundamentals of Social Psychology*, Knopf, N. Y., 1952; Cox, Olive C., *Caste, Class and Race*, Doubleday & Co., Inc., Garden City, N. Y. 1948; Walter, Paul A. F., Jr., *Race and Culture Relations*, McGraw-Hill Series in Sociology and Anthropology, 1952, particularly at p. 13 ff.; Montagu, M. F. Ashley, *Man's Most Dangerous Myth: The Fallacy of Race*, Columbia Univ. Press, New York, 2nd Edition 1945; Schemerhorn, R. A., *These Our People*, D. C. Heath & Co., Boston, 1949, pp. 21 ff.; Rose, Arnold, *The Negro in America*, Harper & Bros., New York, 1948, pp. 31 ff.; UNESCO *"Statement on Race"*, Schumann, New York 1951.

Alexander having white skin stands before the citizens of Smith County as the epitome of all the fancied epithets which make up East Texans' concept of "race."

He, more than one with a darker skin, stands as a symbol of those who would crack established segregation patterns, who would abolish white-black wage differentials, who would lead Negroes in "mixed" organizations, who would raise the economic status of the Negro. Against such a man would necessarily be concentrated the community attitudes, the prejudices, the community resentment of those who believe their experience to justify "white supremacy." Due process and equal protection in judicial determinations involving such a man require inclusion in his jury of "the whole community"; not just that part of the community which has seen fit, since Smith County was organized, to deprive the 29.9% of the community which is Negro, of consideration in the composition of its juries.

The 2/3rds of the county which indicted Alexander, might well have tempered its actions, investigated more fully, checked itself to examine whether its prejudices were showing, had a jury representative of the full 3/3rds of the county considered this case.

WHEREFORE, we respectfully pray that the Petition for Certiorari be granted and the conviction reversed.

Respectfully submitted,

By L. N. D. Wells, Jr.

L. N. D. WELLS, JR.
Counsel for Petitioner
1716 Jackson Street
Dallas, Texas

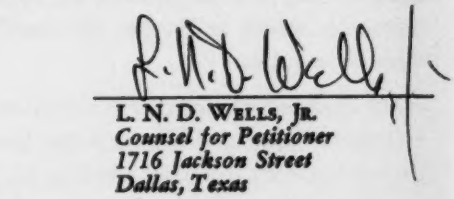
November 24, 1954

MULLINAX & WELLS
OTTO B. MULLINAX
OSCAR H. MAUZY
Of Counsel

Certificate of Counsel

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

A copy of this Motion for Rehearing of Application for Writ of Certiorari, together with a copy of the letter of transmittal to the Clerk of the Supreme Court of the United States, has been served this date on the Honorable John Ben Shepperd, The Attorney General of Texas, Capitol Station, Austin, Texas, and the Honorable Harry Loftis, Criminal District Attorney, Tyler, Smith County, Texas, attorneys for the respondent, by placing properly addressed copies of the same in the United States mails first class postage prepaid.



L. N. D. WELLS, JR.
Counsel for Petitioner
1716 Jackson Street
Dallas, Texas